

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

INSITU, INC.,

Plaintiff,

vs.

MARK KENT,

Defendant.

NO. CV-08-3067-EFS

**ORDER GRANTING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

Before the Court, without oral argument, is Plaintiff Insitu's Motion for Summary Judgment. (Ct. Rec. 8.) Insitu asserts that the Separation Agreement and Release ("Release") entered into by the parties bars Defendant Mark Kent's counterclaims as a matter of law. Mr. Kent counters that the factual issues regarding the Release's enforceability remain for trial. After reviewing the submitted material and applicable authority, the Court is fully informed and, for the reasons set forth below, grants Insitu's motion.

1     **A. Statement of Facts<sup>1</sup>**

2         Mr. Kent, an experienced financial consultant, began working for  
 3 Insitu in June 2007. (Ct. Rec. [35](#) ¶ 2.) While the employment  
 4 agreement's precise terms are disputed, the parties agree that as Vice  
 5 President, Chief Financial Officer, and Treasurer, Mr. Kent was granted  
 6 an option to purchase a quantity of stock that would vest over a four-  
 7 year schedule. *Id.* ¶ 4. On March 5, 2008, Insitu terminated Mr. Kent's  
 8 employment. *Id.* ¶ 6. After Mr. Kent's discharge, the parties, each  
 9 aided by legal counsel, entered into negotiations to agree on the terms  
 10 of Mr. Kent's discharge. *Id.* ¶ 9.

11         During the negotiations, Insitu informed Mr. Kent that, while  
 12 Insitu had engaged in formal acquisition talks with Boeing, there was  
 13 virtually no likelihood for there to be an ownership change in the near  
 14 future. *Id.* ¶¶ 60-62. The financial strain resulting from Mr. Kent's  
 15 termination forced him to sell his house in Washington in order to move  
 16 to California, where he believed he would have better access to future  
 17 employment opportunities. *Id.* ¶ 63. After sharing his financial  
 18 concerns with Insitu, Insitu offered to help him sell his home, provide  
 19 him with work opportunities through a consulting agreement, and provide  
 20

21         <sup>1</sup> In ruling on a motion for summary judgment, the Court considered  
 22 the facts and all reasonable inferences therefrom as contained in the  
 23 submitted declarations, exhibits, and depositions, in the light most  
 24 favorable to Mr. Kent, the party opposing the motion. See *United States*  
 25 *v. Diebold, Inc.*, 369 U.S. 654, 655 (1972) (*per curiam*). The following  
 26 factual recitation was created utilizing this standard, along with the  
 27 parties' Joint Statement of Uncontroverted Facts (Ct. Rec. [35](#)) .

1 strong references for future employment - all in exchange for Mr. Kent's  
 2 signature on the Release. *Id.* ¶¶ 52, 64-70.

3 The parties signed the Release on April 25, 2008. *Id.* ¶ 72. Under  
 4 the Release, Mr. Kent surrendered his rights to Insitu stock options in  
 5 exchange for a \$115,000.00 severance payment. *Id.* ¶ 74. The Release  
 6 expressly states that neither party relied on any statements that were  
 7 not documented in the Release, and that neither party entered into the  
 8 agreement as a result of duress or coercion from any source.<sup>2</sup> *Id.* ¶ 19.  
 9 These statements are referred to as the "no-reliance clause."

10 Insitu did not provide Mr. Kent with consulting service contracts  
 11 and timely references to prospective future employers. *Id.* ¶ 55. On  
 12 July 21, 2008, three (3) months after Mr. Kent signed the Release,  
 13 Boeing and Insitu entered into an agreement under which Insitu became a  
 14 wholly-owned Boeing subsidiary. *Id.* ¶ 79. As a result, had Mr. Kent  
 15 retained his stock options, those options, assuming they vested, would  
 16 have been valued at much more than the severance amount paid to Mr. Kent  
 17 in accordance with the Release. *Id.* ¶ 81.

18 Following Boeing's acquisition of Insitu, Mr. Kent tendered the  
 19 return of the severance payment in exchange for the vacation of the  
 20 Release as null and void. (Ct. Rec. 29.) Insitu refused and, on  
 21

22 <sup>2</sup>The Release states in pertinent part:

23 12. Employee acknowledges that in executing this Agreement,  
 24 Employee does not rely upon any representation or statement by  
 25 any representative of Employer concerning the subject matter  
 26 of this Agreement, except as expressly set forth in the text  
 27 of the Agreement.

28 . . . .

29 14. Employee . . . now enters into this Agreement without  
 30 duress or coercion from any source.

1 October 31, 2008, filed this lawsuit for declaratory relief that Mr.  
2 Kent cannot rescind the Release and is therefore barred from claiming  
3 rights to Insitu stock options. *Id.* Mr. Kent answered, stating that  
4 the Release should be declared unenforceable because 1) he was  
5 fraudulently induced with false misrepresentations and promises by  
6 Insitu, 2) promissory estoppel bars enforcement of the Release, and 3) he  
7 was under duress at the time he signed the release. *Id.* Further, Mr.  
8 Kent filed a counterclaim for declaratory relief stating that the  
9 Release is void and unenforceable because of fraudulent  
10 misrepresentation, promissory estoppel, and duress, and declaring his  
11 entitlement to immediate vesting of all granted stock options. *Id.*  
12 Insitu now asks the Court to dismiss Mr. Kent's counterclaims. (Ct.  
13 Rec. 8.)

14 **B. Standard**

15 Summary judgment is appropriate if the "pleadings, depositions,  
16 answers to interrogatories, and admissions on file, together with the  
17 affidavits, if any, show that there is no genuine issue as to any  
18 material fact and that the moving party is entitled to judgment as a  
19 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for  
20 summary judgment, the opposing party must point to specific facts  
21 establishing that there is a genuine issue for trial. *Celotex Corp. v.*  
22 *Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make  
23 such a showing for any of the elements essential to its case for which  
24 it bears the burden of proof, the trial court should grant the summary  
25 judgment motion. *Id.* at 322. "When the moving party has carried its  
26 burden of [showing that it is entitled to judgment as a matter of law],  
27 its opponent must do more than show that there is some metaphysical  
28 ORDER - 4

1 doubt as to material facts. In the language of [Rule 56], the nonmoving  
 2 party must come forward with 'specific facts showing that there is a  
 3 *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio*  
 4 *Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted).

5 When considering a motion for summary judgment, a court should not  
 6 weigh the evidence or assess credibility; instead, "the evidence of the  
 7 non-movant is to be believed, and all justifiable inferences are to be  
 8 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
 9 (1986). This does not mean that a court will accept as true assertions  
 10 made by the non-moving party that are flatly contradicted by the record.  
 11 See *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties  
 12 tell two different stories, one of which is blatantly contradicted by  
 13 the record, so that no reasonable jury could believe it, a court should  
 14 not adopt that version of the facts for purposes of ruling on a motion  
 15 for summary judgment.").

### 16 C. Authority and Analysis

17 Insitu asks the Court to dismiss Mr. Kent's promissory estoppel,  
 18 duress, and fraudulent misrepresentation counterclaims based on the  
 19 Release's no-reliance clause. Mr. Kent counters that, under the  
 20 circumstances, a jury should consider the merits of these counterclaims.

21 Washington courts follow the objective manifestation theory of  
 22 contracts. *Paradiso v. Drake*, 135 Wn. App. 329, 336 (2006) (noting that  
 23 courts look for the parties' intent by its objective manifestations  
 24 rather than the parties' unexpressed subjective intent). Further, when  
 25 construing a written instrument, Washington courts favor the  
 26 construction that "gives effect to all provisions of the instrument as  
 27 against one which renders some of them meaningless or ineffective."

1       *Wenatchee Prod. Credit Ass'n v. Pac. Fruit & Produce Co.*, 199 Wn. 651,  
 2       658 (1939). With these principles in mind, the Court considers Mr.  
 3       Kent's counterclaims.

4           1. Fraudulent Misrepresentations

5       Mr. Kent claims that the Release should be declared void because it  
 6       was induced by Insitu's fraudulent misrepresentations. Insitu asserts  
 7       that any fraud claims are barred by the Release's no-reliance clause.

8       "[A] release is voidable if induced by fraud, misrepresentation or  
 9       overreaching or if there is clear and convincing evidence of mutual  
 10       mistake." *Nation-wide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187  
 11       (1992). Nine (9) elements must be proven in order to establish fraud:  
 12       1) representation of an existing fact; 2) its materiality; 3) its  
 13       falsity; 4) the speaker's knowledge of its falsity or ignorance of its  
 14       truth; 5) the speaker's intent that it should be acted on by the person  
 15       to whom it is made; 6) ignorance of its falsity on the part of the  
 16       person to whom it is made; 7) the person's reliance on the truth of the  
 17       representation; 8) the person's right to rely upon it; and 9) the  
 18       person's consequent damage. *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d  
 19       915, 920 (1967). At issue are the reliance elements given that the  
 20       Release contains a clause stating that neither party relied on any  
 21       statements not documented in the Release. Because reliance is an  
 22       element of fraud, the no-reliance clause, if upheld, precludes any claim  
 23       of fraud.

24       The Washington Supreme Court has not ruled on whether no-reliance  
 25       clauses bar fraud and promissory estoppel claims. Therefore, the Court  
 26       is obligated to follow the decisions of the Washington intermediate  
 27       appellate courts. See *Nelson v. City of Irvine*, 143 F.3d 1196, 1206  
 28       ORDER - 6

(9th Cir. 1998). Washington appellate courts offer ample guidance.<sup>3</sup> In *Helenius v. Chelius*, 131 Wn. App. 421 (2005), the Washington Court of Appeals emphasized the lack of any “reliance” language before finding that a fraud claim was not barred. Later, in *Kwiatkowski v. Drews*, 142 Wn. App. 463 (2008), the court held that no-reliance clauses bar fraud, misrepresentation, and equitable estoppel claims because they eliminate any reasonable reliance on external promises.

8       Here, like *Kwiatkowski*, two sophisticated parties, each represented  
9       by counsel, were involved in an inherently adversarial settlement  
10      agreement. Mr. Kent is an educated business man who served as Insitu's  
11      Vice President, Chief Financial Officer, and Treasurer. His attorney  
12      was actively involved in negotiating the Release terms and obtained  
13      revisions to its terms favorable to Mr. Kent before it was executed.  
14      Mr. Kent was also given twenty-one (21) days to consider whether to sign  
15      the release and seven (7) days to revoke his acceptance after signing.  
16      After careful scrutiny, Mr. Kent knowingly agreed that he had not relied  
17      on any promises or agreements not contained in the Release.  
18      Accordingly, the Court finds as a matter of law, that Mr. Kent cannot  
19      prove reliance given the Release's no-reliance clause. Therefore, the  
20      fraudulent misrepresentation claim is dismissed.

<sup>3</sup>See *Kwiatkowski v. Drews*, 142 Wn. App. 463 (2008) (finding that plaintiff's fraud, misrepresentation, and equitable estoppel arguments had no merit because they were precluded by a no-reliance clause in the contract); *Helenius v. Chelius*, 131 Wn. App. 421 (2005) (emphasizing the absence of any "reliance" language in the integration clause before finding that a fraud claim was not barred).

1       2. Promissory Estoppel

2       Mr. Kent also counterclaims that the Release is unenforceable under  
3 the doctrine of promissory estoppel because he was induced to sign by  
4 Insitu's broken promises. Insitu contends that Mr. Kent's promissory  
5 estoppel claim is also barred by the no-reliance clause in the Release.

6       A promise is enforceable under the doctrine of promissory estoppel  
7 when a party can establish: 1) a promise which 2) the promisor would  
8 reasonably expect to cause the promisee to change his position and 3)  
9 which does cause the promisee to change his position 4) justifiably  
10 relying upon the promise in such a manner that 5) injustice can be  
11 avoided only by enforcement of the promise. *Jones v. Best*, 134 Wn.2d  
12 232, 239 (1998).

13       Again, the main issue is whether Mr. Kent justifiably relied on  
14 Insitu's alleged promises. As stated above, the no-reliance clause  
15 eliminates any justifiable reliance on a promise that was not contained  
16 within the contract. The release did not contain a promise that Insitu  
17 would provide Mr. Kent with consulting service contracts and timely  
18 references to prospective future employers. Given the sophisticated  
19 nature of the parties and Mr. Kent's ability to negotiate the contract,  
20 such alleged promises could have been included. They were not; what was  
21 included was the no-reliance clause. Accordingly, Mr. Kent's promissory  
22 estoppel counterclaim is dismissed.

23       3. Duress

24       Mr. Kent claims that the Release is unenforceable because he signed  
25 it under duress caused by the potential harm to his professional  
26 reputation and financial strains associated with prematurely losing his  
27 job. Insitu states that Mr. Kent cannot and has not proved he was under  
28 ORDER - 8

1 any duress.

2 Mr. Kent arguably had one or more causes of action against Insitu.  
 3 Rather than litigate those claims, Mr. Kent hired an attorney,  
 4 negotiated a settlement agreement and received the benefits due under  
 5 that agreement. In his counterclaims seeking to void that settlement  
 6 agreement, with his former employer, he now claims that his job loss,  
 7 combined with difficulties in selling his Washington house and being  
 8 shunned by the small community in which Insitu is located, caused him  
 9 personal and financial duress. (Ct. Rec. 30: Kent Decl. ¶¶ 13-15.) In  
 10 a contract case where one party seeks avoidance of the contract because  
 11 of duress, and some other party files a motion for summary judgment on  
 12 that duress claim, the non-moving party then has the burden of  
 13 producing admissible evidence which by itself or together with  
 14 reasonable inferences therefrom creates a genuine issue of material fact  
 15 that the non-moving party was under the kind of duress that voids the  
 16 contract. See *Celotex Corp.*, 477 U.S. at 322 (discussing, generally,  
 17 the burden that must be met to survive a motion for summary judgment).  
 18 In Washington, the standard for duress sufficient to void a contract is  
 19 greater than reluctance, financial embarrassment, or pecuniary  
 20 necessity; rather, the party asserting duress must have been deprived of  
 21 free will in signing the contract. *Retail Clerks Health & Welfare Trust*  
 22 *Funds v. Shopland Supermarket*, 96 Wn.2d 939, 944-45 (1982).<sup>4</sup>

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24                          An example of duress is "The Godfather" negotiation from the  
 25 classic film of the same name. "My father made him an offer he couldn't  
 26 refuse . . . Luca Brasi held a gun to his head, and my father assured  
 27 him that either his brains or his signature would be on the contract."  
 28 ORDER - 9

1       Here, the asserted duress is of the type that inheres in typical  
2 disputes between a terminated employee and the former employer in a  
3 relatively small town where the company is a major employer. Plaintiff  
4 has failed to produce admissible evidence which together with  
5 reasonable inferences therefrom creates a genuine issue of material fact  
6 that Defendant applied duress that deprived Plaintiff of his free will  
7 in executing this settlement agreement. Accordingly, Plaintiff has not  
8 met his *Celotex* burden.

9 **D. Conclusion**

10     Because Mr. Kent was unable to demonstrate as a matter of law that  
11 the Release was invalid or void due to fraud, promissory estoppel, or  
12 duress, the Release is enforceable.

13     For the reasons given above, **IT IS ORDERED:** Plaintiff's Motion for  
14 Summary Judgment (**Ct. Rec. 8**) is **GRANTED**; Defendant's counterclaims are  
15 dismissed.

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20     THE GODFATHER (Paramount Pictures 1972). Undoubtedly, before it was  
21 memorialized in "The Godfather", the technique had been utilized just  
22 often enough to become a figure of speech, hence the colloquial  
23 figurative explanation, "What could I do? He had a gun to my head." This  
24 is included as only one extreme example of duress sufficient to void a  
25 contract. There are surely other forms of duress which would deprive one  
26 of free will.

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and distribute copies to counsel.

3 DATED this 17<sup>th</sup> day of June 2009.

5 S/ Edward F. Shea  
EDWARD F. SHEA  
6 UNITED STATES DISTRICT JUDGE

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